

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. **77-633**

CHARLES IRVIN and Wife
MARY ELIZABETH IRVIN
Petitioners

v.

CARLEEN V. SIMS *et al*
Respondent

PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

Armistead W. Sapp, Jr.
Counsel for Petitioners
219 West Washington Street
Greensboro, North Carolina 27401
(919) 275-7206

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No.

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PETITION FOR A WRIT OF CERTIORARI
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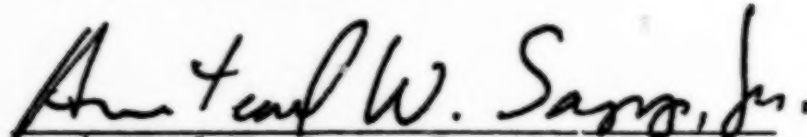
MOTION

Armistead W. Sapp, Jr., Esquire, on
behalf of the Petitioners, Charles Irvin
and wife, Mary Elizabeth Irvin, respect-
fully MOVES this Court, pursuant to Rule 31
of the Rules of the United States Supreme
Court, for a leave to file this Petition
that a Writ of Certiorari issue to review
the decree of the United States Court

of Appeals for the Fourth Circuit entered in the above case on July 11, 1977, confirmed August 4, 1977, affirming the Memorandum Order of the United States District Court for the Middle District of North Carolina, Greensboro Division, entered January 11, 1977, denying relief to Petitioners Irvin where their then attorney Norman B. Smith, Esquire, brought and maintained this suit against them for Respondent Sims at a time when he was actively representing them in a matter substan- tially related to the same subject matter continuing such dual representation of adverse interests for more than three months until it was brought to the attention of the District Court which, Petitioners objecting, permitted Smith's withdrawal and denied

Petitioners' motions for dismissal of Respondent's claim and sanctions, and dismissed Petitioners' counterclaim, which the Fourth Circuit had July 11, 1977 (unpublished) to be both not a final and a final judgment dismissing Petitioners' appeal and alternative Petition for Writs of Certiorari, Mandamus and Prohibition; rehearing denied August 4, 1977, all pursuant to the provisions of 28 U.S.C.A. §1254(1) and 28 U.S.C.A. 1651(a).

RESPECTFULLY MOVED, this the 31st
day of October, 1977.


Armistead W. Sapp, Jr.
Counsel for Petitioners
219 West Washington Street
Greensboro, North Carolina 27401
(919) 275-7206

OPINIONS BELOW

The memorandum opinion of the District Court for the Middle District of North Carolina which

Granted Petitioners' Motion to Dismiss Respondent's Fair Housing action claims, 42 U.S.C. §3610(d) and 3612 because of their being time barred [R.pp. A-5; cf. A-14], not appealed from;

Denied Petitioners' Motions to Dismiss and for Summary Judgment [R.pp. A-3 - A-7];

Denied Petitioners' Motion to Stay Proceedings and for sanctions following a full evidentiary hearing and trial by jury as at common law

[R.p. A-12 - A-13];

Dismissed Petitioners' Counterclaim upon Respondent's Motion [R.p. A-17 - A-12];

Denied Petitioners' Motion to Dismiss Respondent's claim for determination as class action [R.p. A-3 - A-7, A-12];

Reserved decision on Respondent's Motion for a Determination that the action be allowed to proceed as a class action pursuant to Federal Rules of Civil Procedure, Rule 23(c)(1) [R.p. A-12]; and

Provided that discovery Motions and Objections to discovery will be considered by the Magistrate for

initial determination by the
Magistrate [R.p. A-14]

is unreported; a copy of which is
appended to this Petition beginning on
page A-1. The Order of the Circuit
Court of Appeals denying the appeal and
Petitioners' alternative Petitions for
Writs of Certiorari, Mandamus
and Prohibition is unreported;
a copy of which is appended to this
petition beginning on page B-1. The
Court of Appeals' Order denying
Petitioners' Petition for Rehearing is
also unreported, a copy of which is
appended to this Petition beginning on
page C-1.

JURISDICTION

The Decree and Order of the Court of
Appeals for the Fourth Circuit were made
and entered on July 11, 1977 [R.p. B-1]
and August 4, 1977 [R.p. C-1], respective-
ly. The jurisdiction of this Court
is invoked under 28 U.S.C.A. §1254(1) and
28 U.S.C.A. §1651(a).

QUESTION PRESENTED

Where Respondent's attorney currently represented Petitioners in a substantially related state court action, did the Courts below deny Petitioners due process in:

I.

failing to dismiss Respondent's claims;

II.

dismissing Petitioners' counter-claim;

III.

denying Petitioners' motion in the alternative for a stay of proceedings and sanctions?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND CANONS INVOLVED

The pertinent portions of the following constitutional provisions, statutes, rules and canons are set forth in Appendix D to this Petition:

United States Constitution:

Amendment XIV

United States Code:

Title 28, §§ 1254, 1291, 1292
1331, 1343, 1651

Title 42, §1982

North Carolina General Statutes:

§4-1

Appendix VII - Code of Professional
Responsibility of the North
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Canon 4: EC4-1, EC4-5

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Federal Rules of Civil Procedure:

Rules: 11, 12, 23, 54, 56

Manual for Complex Litigation:

§1.40

§1.41

Local Rules, Middle District of North
North Carolina:

Rule 17

Corpus Juris Secundum

Conspiracy §5

STATEMENT

On May 13, 1975 Respondent sought to rent an apartment located at 2015-D Maywood Street, Greensboro, North Carolina, from Petitioners. Her application was refused. Respondent's verified Complaint was filed February 19, 1976 claiming housing discrimination. She seeks to proceed in this suit under 28 U.S.C. §1331, 28 U.S.C. §1343, 42 U.S.C. §1982, her claims under 42 U.S.C. §3610(d) and 42 U.S.C. §3612 having been dismissed. Petitioners moved to dismiss Respondent's claims filing Affidavits and in the alternative moved for Summary Judgment [Rules 12(b)(6) and 56(b), F.R.C.P.] for that the Complaint failed to state

a claim against Petitioners upon which relief can be granted, and as to her class action claim, she failed to comply with Rule 23(a)(b) F.R.C.P. and Local Rule 17(b)(2)(a)(b), (3) and (4). Respondent responded; Petitioners answered and counterclaimed for damages propounding Interrogatories to Respondent. Respondent replied to Petitioners' Counterclaims moving to dismiss. Petitioners responded to Respondent's Motion for Summary Judgment as to their Counterclaim. Respondent moved for determination under Rule 23(c)(1) responded to by Petitioners. Respondent filed Affidavit of Sims and her Answers to Interrogatories.

Discovery proceeded prior to initial pre-trial conference.

Respondent's then counsel, Norman B. Smith filed Interrogatories for Respondent seeking to "discover" facts with respect to Petitioners' real property. Smith was at that same time representing Petitioners Irvin in a state action involving their real property. A Motion for Stay of Proceedings, requesting an evidentiary hearing and sanctions including dismissal of Respondent's action was immediately filed May 28, 1976. Smith moved to withdraw as counsel June 23, 1976 which was allowed June 24, 1976, Petitioners objecting and excepting June 29, 1976 having moved for sanctions following a full evidentiary hearing. After hearing on motions December 14, 1976, Judge Eugene A. Gordon, by Memorandum Order dated January

5, 1977 and received January 10, 1977 which dismissed Respondent's fair housing action claims, 42 U.S.C. §§ 3610(d) and 3612 (not appealed from); dismissed Petitioners' counterclaim; denied Petitioners' motions to dismiss, for summary judgment, for a stay of proceedings and for sanctions following a full evidentiary hearing and trial by jury as at common law, and denied Petitioners' motion to dismiss Respondent's claim for a determination as class action; reserved decision on Respondent's motion for a determination that the action be allowed to proceed as a class action pursuant to F.R.C.P., Rule 23(c)(1); and provided that discovery motions and objections would be considered

by the Magistrate for initial determination by the Magistrate. Petitioners appealed to the United States Court of Appeals for the Fourth Circuit, and in the alternative, filed a Petition for Writs of Certiorari, Mandamus and Prohibition.

The United States Court of Appeals for the Fourth Circuit dismissed the appeal July 11, 1977 on Respondent's motion holding that the the Court is without jurisdiction

"* * * to hear an appeal on the issues other than those relating to disqualification since there is not yet any final judgment within the meaning of 28 U.S.C. §1291,

nor certification under either

28 U.S.C. §1292 or F. R. Civ.

P. 54(b)* * * *" (emphasis supplied)

[R.p. B-4]

and declined to issue the alternatively requested Writs of Certiorari [held unavailable from the Fourth Circuit], Prohibition and Mandamus stating that these latter two writs

"* * * are extraordinary writs, and are not substitutes for an appeal after the rendering of final judgment * * * [citing cases] * * * Accordingly, we decline to issue either of these writs in this case * * * "

(emphasis supplied)

[R.p. B-4 - B-5]

Petitioners filed a Petition to Re-hear which was subsequently denied August 4, 1977, which rulings and denial Petitioners pray be reversed. The Court below holds the Memorandum Order of the District Court to be anomalously both: not yet a, and a, final judgment. Petitioners hoisted upon either horn of this unreported judicial dilemma are denied their right of judicial review and deprived of their property without substantive and procedural due process of law.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the All Writs Statute, 28 U.S.C. §1651, so as to disrupt the orderly administration of justice. The decision below is in conflict with the decisions of this Court, or if it is not so in conflict, "issues of far reaching importance," Touhy v. Ragen, 340 U.S. 462, at 470, 71 S.Ct. 416, 95 L.Ed. 417, 423, left undecided in this case must be faced. In either event this Court should grant review. The foundation of our judicial system is the attorney-client relationship. No adversary should be permitted to benefit from such tortious breach of the confidential attorney-client relationship demonstrated

on this record. Smith's knowledge is imputable as to Sims under the doctrine of respondeat superior. The wrong cannot be cured by the mere withdrawal of Smith. Smith has poisoned Sims' evidentiary well.

I.

Where Respondent's attorney concurrently represented Petitioners in a substantially related state court action, did the Courts below deny Petitioners due process in: failing to dismiss Respondent's claims?

* * *

The Court misapprehended the facts

in assuming the Irvins:

" * * * discovered that Smith (plaintiff's counsel) was representing them in a state court proceeding involving trespass to another piece of property owned by them. They immediately moved for disqualification of counsel."

[R.pp. B-2 - B-3]

The Irvins were aware of the conflict and the ethical problem posed by their own attorney suing them, and filed their Motion for Stay of Proceedings and Objection to Interrogatories and Demand for Production of Documents seeking an evidentiary hearing to determine whether Smith's dual representation

" * * * has so poisoned Plaintiff's [Respondent's] evidentiary well as to demand dismissal of her claim against these Defendants [Petitioners] with prejudice and leave her to her remedy, if any, against her attorney, and agent who seeks to serve two masters."

Petitioners sought dismissal of Respondent's action because of the imputation of illicitly gained knowledge to Respondent from her agent, Attorney Smith, only after Smith's Second Set of Interrogatories for Respondent demonstrated that the cases would be substantially related.

The Court misapprehended the record. Irvins never moved for Smith's withdrawal. On the contrary, they moved for dismissal of Respondent's action, sanctions against Attorney Smith and his client, and moved for a Stay of Proceedings and OBJECTED to Respondent's first and second sets of interrogatories. Irvins, anticipating Attorney Smith's Motion to Withdraw, opposed the same for that it would not cure the evil perpetrated, stating:

"Defendants particularly OBJECT to Plaintiff's [Respondent's] first and second sets of Interrogatories and Demand for Production of Documents as they relate to the very matter at issue in the state action as being the fruit of an infected tree; and will

more particularly state their objections should the Court not dismiss Plaintiff's [Respondent's] claim but seek to cure Defendants' [Petitioners'] damages by causing the withdrawal of Plaintiff's cum Defendants' counsel with sanctions."

Such Motions were filed and docketed by the Irvins on May 28, 1976. Nearly a month later, on June 23, 1976, Norman B. Smith filed the anticipated Motion to Withdraw as counsel for Respondent and the Court permitted such withdrawal without notice to the Irvins by Order docketed June 24, 1976 to which Petitioners filed Exceptions docketed July 6, 1976.

Irvin submit that final judgment has been entered both as to their counterclaim and the Court below's proper dismissal of Respondent Sims' §§ 3610 and 3612 claims. The Fourth Circuit Court of Appeals recognized that the District Court below granted " * * * plaintiff's motion to dismiss the Irvin counterclaim * * *" [R.p. B-4] but holds that it is without jurisdiction

" * * * to hear an appeal on the issues other than those relating to disqualification since there is not yet any final judgment within the meaning of 28 U.S.C. §1291, nor certification under either 28 U.S.C. §1292 or F. R. Civ. P. 54(b)."

[R.p. B-4]

Respondent concedes that her claim under the Fair Housing Act of 1968 is "time barred", Young v. AAA Realty Co. of Greensboro, Inc., 350 F.Supp. 1382 (M.D.N.C., 1972), and cases cited in these Petitioners' brief filed March 15, 1976. The record does not support Respondent's §1982 claim that Petitioners denied any right to lease real property enjoyed by white citizens of North Carolina to any identifiable class, and if Respondent asserts any claim upon which relief might be granted her, which is denied, then such action as she attempts to state could not be maintained as a class action against any identifiable class as a matter of law. American

Serviceman's Union v. Mitchells, 54 F.R.D. 14 (D. DC, 1972); Cooper v. Allen, 467 F.2d 836 (5th Cir., 1972). No definite and identifiable class has been defined as required. Rule 23(a), F.R.C.P.

Respondent has failed to make even a prima facie case of racial discrimination. Respondent's own application and answers to interrogatories establish that she made false statements on her application. Petitioners agree that applicants who made false statements upon applications for rental of their apartments are not "their kind of people." Giving Respondent every permissible inference, she has made no case, prima facie or otherwise, of racial discrimination and has established that the cause

of Petitioners' refusal to rent to her their premises as being Respondent's false application. The Court below should have dismissed Respondent's action. The entire record shows Petitioners' right to judgment with such clarity as to leave no room for controversy and that Respondent cannot prevail under any circumstance, Phoenix Savings and Loan, Inc. v. Aetna Casualty & Sur. Co., 381 F.2d 245 (4th Cir. 1967).

If Respondent had any claim upon which relief can be granted, which is DENIED, then such action could not be maintained as a class action on behalf of

"all of the minority persons similarly situated * * * members of racial minorities, who desire, have desired, and in the future will desire to rent apartments from Defendants in Greensboro, North Carolina, and who might have been and continue to be or might be adversely affected by the practices complained of herein."

Complaint, Article 5.

which is entirely too broad a class in the context of this litigation, Wallace v. Brewer, 315 F.Supp. 431 (D.C. Ala., 1970), Crim v. Glover, 338 F.Supp. 823 (D.C. OH, 1972). Such a "class" could not be identified by discovery; and if it could, the

expenses of such discovery, including reasonable attorney's fees for Respondent's cum Petitioners' attorney would have to be paid by Respondent, Eisen v. Carlisle and Jacquelin, 370 F.2d 119 (2d Cir., 1966), 391 F.2d 555 (1968); 479 F.2d 1005, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 732 [which requires notice to identifiable class members by Respondent and holds a class may not be tailored to the pocketbooks of particular plaintiffs]. This is injunction pleading, not class pleading. Rule 23(b)(2). No damages to the proposed "class" are asserted. What damages could be properly determined and awarded if any injury could be shown? A cause of action for damages involves essentially three issues (1) did Defendants violate the law; (2) did the violation damage Plaintiffs;

(3) if so, how much was each Plaintiff damaged? As to Respondent's proposed class, proof and speculation would vary from member to member. This action is not appropriate for class action. Rule 23(b)(1)A, F.R.C.P.

As a class action, this fuss between rejected applicant Respondent and her allegedly hoped-for landlord Petitioners [who deny discriminating or denying applicant any right, enjoyed by white citizens of the State of North Carolina, to lease real property], presents impossible manageability problems reaching the point of absurdity, Ratione Cessat, Lex Cessant: Rule 23(b)3D, F.R.C.P., 28 U.S.C.A.; City of Philadelphia v. American Oil Co.,

53 F.R.D. 45 (D.N.J., 1971);
Schaffner v. Chemical Bank, 339 F. Supp. 329 (S.D.N.Y., 1972);
Hawaii v. Standard Oil Co. of Cal., 301 F.Supp. 982 (D. Hawaii, 1969), reversed 431 F.2d 1282 (9th Cir., 1970), affirmed 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972);
Bailey v. Sabine River Authority, 54 F.R.D. 42 (W.D.La., 1971);
Gerlach v. Allstate Ins. Co., 338 F.Supp. 642 (S.D.Fla., 1972);
Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir., 1972) cert. denied 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972).

As a class action, if permitted to proceed by this Court, it would not be likely to benefit anyone but the lawyer who brought it, Eisen II, 391 F.2d 555, 567 (1968).

Here as in Eisen II, no class member would be likely to share in an eventual judgment and a class action should not be permitted. If Respondent prevails on her Motion, bond, in at least the amount of \$25,000.00, should be posted by Respondent within 30 days as security for notification and costs of identification of the class; Turoff v. Union Oil of California, 61 F.R.D. 51 (N.D. Ohio, 1973); Eisen, supra; Stavrides v. Mellon National Bank and Trust Co., 60 F.R.D. 634 (W.D. Pa., 1973); Berse v. Berman, 71 Civ. 4895 (S.D.N.Y., May 14, 1973). Respondent has demonstrated no financial resources to adequately represent the class she purports to represent. Her Motion should be DENIED. Rule 23(a)(4), F.R.C.P.

Preliminary determination of the merits is not permitted. The matter for determination is whether the requirements of Federal Rule of Civil Procedure 23 and Local Rule 17 are met. These requirements have not been met. These requirements cannot be met. Both notice and adequate representation must be provided under Rule 23 and the class must be identifiable. Should the Court not deny Respondent's Motion for Determination, Section 1.40 of The Manual for Complex Litigation (1973) emphasizes the need for an early determination as to whether the action should proceed as a class action and states that if class action proceedings are initiated, the Court should make written determination of requisite findings under

subdivisions (a) and (b) of Rule 23 and should, in an evidentiary hearing, afford the opposing parties an opportunity to refute such findings, before entering any Order determining this matter a proper claim for class action.

Respondent's action seems derivative of United States ex. rel. Mayo v. Satan and His Staff, 54 F.R.D. 282 (W.D. Pa., 1971). Petitioners neither by character, reputation, actions nor upon Respondent's allegations are proper parties defendant to such a class action as sought to be here litigated. Respondent's Motion should be DENIED and her asserted claim DISMISSED.

Sims' remaining claims must be dismissed. Her agent, Attorney Smith, sued his own client, Irvins, at a time when he represented Irvins, and Smith continued to represent both Sims and Irvins for more than three months after the institution of Sims' action against Irvins until discharged by Irvins who filed for dismissal of this action and sanctions May 28, 1976.

Irvins' attorney has found numerous decisions relating to successive representation of clients where interests conflict, representative are: Hull v. Celanese Corporation, 513 F.2d 568 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d

562 (2d Cir. 1973); Richardson v. Hamilton International Corp, 469 F.2d 1382 (3d Cir. 1972) cert. denied, 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1972); Chugach Elec. Ass'n v. United States District Court, 370 F.2d 441 (9th Cir. 1966). These cases arise on Motions for disqualifications of the attorney because of knowledge rebuttably presumed to have been obtained during prior confidential relationships. This is not the case here. Smith's confidential relationship with Irvins continued more than three months after Smith sued Irvins.

The Circuit Court in Colorado held in Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975) that the verified motions of disqualification of one of

plaintiff's attorneys because of conflict of interest resulting from such attorney's prior representation of one defendant in matters generally relating to subject matter out of which suit arose required written response and full evidentiary hearing. Even more so here when the sanctions including dismissal and damages have been sought by Irvins. Their claims should not have been summarily dismissed in a memorandum opinion complimentary of their shared counsel's candor.

Irvins' counsel finds no reported actions where a single attorney simultaneously sought to represent a client and sued that client on a related or unrelated matter.

Judge Gordon found that Sims had failed to state a cause of action under the Fair Housing Act of 1968, ruling: " * * * Consequently, the plaintiff's claim under the Fair Housing Act cannot be maintained * * * " [The court reporter notes only the denial of Petitioners' Motion to Dismiss] Dismissing Irvins' Counterclaim, the Court holds " * * * It is clear that a claim for malicious prosecution cannot be maintained until the termination, in favor of the defendant, of the litigation which forms the basis of the claim [citation] * * * * " That technical requirement is met by Judge Gordon's dismissal of Respondent's

Fair Housing Act claim. Irvins' counterclaim should not have been dismissed.

B. Respondent lacks the financial resources to bear the costs of identifying and notifying all members of the amorphous group she contends to be a class and lacks, on this record, interest, knowledge and sophistication necessary to control her attorney, Smith, who, prosecuting this action with unfettered discretion, became, in fact, the representative of any "class", In re Goldchip Funding Company, 61 F.R.D. 592, 595 (M.D.Pa., 1974), Carlisle v. LTV Electro-Systems, Inc., 54 F.R.D. 237 (N.D. Texas, 1972), Manual for Complex Litigation, §1.41 (1973). Irvins have been damaged by Smith and Sims; their counterclaim

should not be dismissed.

It is submitted that the Fourth Circuit Court of Appeals, having exercised its jurisdiction to hear this appeal on the issues relating to disqualification, has erroneously applied the law to its misconception of the facts. Petitioners Irvin, having been sued by their own counsel at a time when he was actively representing them in a matter substantially related to the matter in which they retained him, such tortious conduct is imputed to Respondent Sims under the doctrine of respondeat superior. Irvins are entitled, upon an evidentiary hearing and a trial by jury, to such relief in this action, including dismissal of Respondent's claim, as their proof establishes upon their allegations that attorney Smith's knowledge has so

poisoned Respondent's evidentiary well that a continuance of her action would be a taking of Irvins' property without due process of law.

The Fourth Circuit Court of Appeals holds there is no final judgment, since all the issues between the parties are not yet resolved [R.p. B-4]. It is submitted that if this be so, the Writs of Prohibition and Mandamus are not here a substitute for an appeal after the rendering of final judgment as held below by the Fourth Circuit Court of Appeals [R.pp. B-4 - B-5], but are sought to perform their historical supervisory office of preventing the administration of injustice. The questions on the record before the Court of Appeals were whether Attorney Smith, as agent for Respondent, wronged his clients Irvin

by bringing suit against them while actively representing them; whether, as ultimately pleaded by Smith, the action against Irvins for his client Sims was substantially related to the matter Smith was retained to bring, brought, and was actively pursuing for the Irvins; whether Smith's wrongful actions and knowledge, imputed to his client, are sufficient grounds to dismiss this Respondent's action summarily; and finally, whether in order to prevent further damage to the Irvins arising from their attorney's suit against them, all actions in this suit should remain stayed until Irvins' Motion to Dismiss Respondent's action is adjudicated upon evidentiary hearing before a jury as prayed by them.

It is not the refusal of sanctions that is the subject of this interlocutory appeal; it is the refusal of an evidentiary hearing and judicial determination upon trial by jury of Petitioners Irvin's Motion to Dismiss because of the wrongful conduct of the shared attorney Smith. The denial of the relief prayed denies the Irvins an adequate remedy of the wrong suffered. It is because the claim is not independent of the main action that the Writs of Prohibition and supervisory Mandamus should issue upon the authorities cited in these Petitioners' Briefs filed in the action below.

The District Court below erroneously concluding that " * * * Norman B. Smith, had previously represented the

defendant [petitioners] in a State action * * * denied Irvins' Motion to Dismiss and for sanctions including damages from respondent and Attorney Smith; the Record establishing that Smith concurrently sought to represent both Irvins and Sims in related actions and continued such dual representation of adverse interests for more than three months until the matter was brought to the attention of the Court. Irvins assert error on the part of the Appeals and District Courts below in refusing to dismiss Sims' claims; denying Irvins' Motion to Dismiss Respondent's claim with respect to the Class Action; in refusing to Stay the Proceedings pending evidentiary hearing before a jury and for sanctions as to Sims, including dismissal and error in granting Respondent's Motion to Dismiss

Petitioners' Counterclaim without evidentiary hearing and trial by jury as at common law.

II.

Where Respondent's attorney concurrently represented Petitioners in a substantially related state court action, did the Courts below deny Petitioners due process in: dismissing Petitioners' counterclaim?

* * *

The Court clearly erred in granting Respondent's Motion to Dismiss Petitioners' Counterclaim based on abuse of process, malicious prosecution, common barratry and champerty for the reasons set forth in Petitioners' Brief below. Respondent's claim for injury arising from Petitioners' refusal to rent her an apartment is frivolous; Attorney Smith's action for Respondent under the Fair Housing Act was time-barred at the time he brought it against his clients Irvin; and he particularly knew that it was

time-barred because of his imputed, if not actual, familiarity with Young v. AAA Realty Co. of Greensboro, Inc., 350 F.Supp. 1382 (M.D.N.C. 1972) for which citation the Court in its opinion thanks him for his "candor". This action was brought by his firm; his partner Marion Follin appearing for complainant Young and was cited by the Fourth Circuit Court of Appeals in its opinion Hickman v. Fincher, 483 F.2d 855, 857 (4th Cir. 1973), relied upon by these Petitioners in their Brief upon their Motion to Dismiss filed below March 15, 1976. This cause of action was dismissed by the Court below. Attorney Smith cannot reasonably argue that he "forgot" both whom he personally represented and what results his firm had obtained

in the Young action. He brought a frivolous, time-barred claim against these Petitioners, his then clients.

The United States Court of Appeals for the Fourth Circuit held fourteen years ago " * * * [w]hether a lawyer is employed by a prosperous defendant at a handsome fee or serves an indigent without compensation in the discharge of the duty resting upon him as an officer of the court, the canons of our profession require his entire devotion to the interest of the client, warm zeal in the maintenance and defense of his client's rights and the exertion of his utmost learning and ability.' American Bar Association, Canons of Professional Ethics, Canon 15 * * * " Turner v. State of Maryland,

318 F.2d 852, 854 (4th Cir. 1963), cf. Cord v. Smith, 338 F.2d 516, 521, (9th Cir. 1964) mandate clarified 370 F.2d 418.

Petitioners contend that the long dormant §1982 has not been revitalized in so far as the facts of this case appear, there being no act of racial discrimination involved. Respondent's §3610(d) claim was time-barred and was dismissed. Plaintiff's §1982 claim does not exist in law and fact and should be dismissed for the reasons set forth in Petitioners' Motion.

Remedies under the Civil Rights statutes are subject to defenses

which are valid at common law.

Rodriguez v. Jones, 473 F.2d 599
(5th Cir. 1973), certiorari denied 93
S.Ct. 3023, 412 U.S. 953, 37 L.Ed.2d
1007.

Good faith is a defense to liability
under Civil Rights Acts, Handverger v.
Harvill, 479 F.2d 513 (9th Cir.
1973), certiorari denied 414 U.S. 1072,
94 S.Ct. 586, 38 L.Ed.2d 478; Williams v.
Gould, (9th Cir. 1973).

Respondent's answers to interroga-
tories establish that she claimed:

"I attempted to rent an
apartment at the Irvin
apartments and was refused
because of my skin color
in my opinion,"

(emphasis supplied)

In her answer to Interrogatory
no. 13, she stated: "No blacks or
Jamaicans lived in the Maywood Street
Apartments at that time, as far
as I know." [emphasis supplied]
She asserts tortious acts and discrimina-
tory conduct without investigation; her
suit is champertous and extortionate;
it should be dismissed. Petitioners'
affidavits establish that they had,
at all times since becoming owners
of the premises, carried on a policy
of non-discrimination in the rental
of housing, renting to applicants
without discrimination and at the
time Respondent sought to rent an
apartment from Petitioners they
had as tenants Jamaicans, Indians
and members of other groups which
might be labeled either religious
or racial minorities.

Conceding for the purposes of argument only, and not admitting that Sims had any claim against Irvins, in retaining Irvins' attorney Smith to prepare and present such a claim, Sims seeks to prevail by wrongful means. Irvins alleged wrongful and overt acts on the parts of Sims and Sims' attorney, Smith. The Supreme Court of North Carolina has defined civil conspiracy as "an engagement between two or more individuals to do an unlawful act or to do a lawful act in any unlawful way." Irvins have alleged the filing of the complaint by Smith for Sims as an overt act, the necessary prerequisite to liability alleged to flow from the properly alleged conspiracy. Although it may well

be argued by Sims, but not conceded, that Smith's breach of the confidential relationship then existing between Irvins and himself in filing the suit against his own clients is not "illegal," it must be said that such act was "wrongful", violative of Irvins' trust and confidence in Smith and of the Canons of Ethics and Disciplinary Rules adopted by the North Carolina State Bar. Irvins' counterclaim contains allegations that Respondent's attorney knew or should have known that there is no good ground to support the complaint and it was filed in violation of Rule 11, F.R.C.P. To create civil liability for conspiracy, a wrongful act, resulting in injury to another must be done by one or more of the

conspirators pursuant to a common scheme and in furtherance of a common object, and ordinarily conspiracy is important only because of its bearing upon the rules of evidence or persons liable. Holt v. Holt, 232 N.C. 497, 61 S.E.2d 448 (1950). The gravaman of the action is the resultant wrong, not the conspiracy itself. Muse v. Morrison, 234 N.C. 195, 66 S.E.2d 783 (1951); Burton v. Dixon, 259 N.C. 473, 131 S.E.2d 27 (1963). To create civil liability for conspiracy, there must have been an overt act by one or more of the conspirators pursuant to the scheme and in furtherance of the objective. Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955); Burns v. Gulf Oil Corp., 246 N.C. 266, 98 S.E.2d 339 (1957), citing

15 CJS Conspiracy §5. Such conspiracy and acts, including prosecution of Sims' claims, resulted in damages to Irvins. Due Process requires those damages to be ascertained on trial by jury.

Sims' assertion of a time-barred Fair Housing Act claim was properly dismissed by Judge Gordon. Sims did not appeal therefrom. Irvins' claims for damages arising from that abuse of process are well pleaded.

A. The Petitioners have stated a claim to recover damages for

(1) ABUSE OF CIVIL PROCESS CAUSING MENTAL SUFFERING, King v. Britt, 267 N.C. 594, 148 S.E.2d 594 (1966), Newton v. McGowan,

256 N.C. 421, 124 S.E.2d 142
(1962), Local Union v. Country Club
East, Inc., 142 N.C.App. 744,
189 S.E.2d 760, cert. allowed
281 N.C. 756, 191 S.E.2d 355,
reversed 283 N.C. 1, 194 S.E.2d
848.

(2) COMMON BARRATRY, the
offense of frequently exciting
and stirring up of quarrels
at law or otherwise, State v.
Batson, 220 N.C. 411, 17 S.E.2d
511, 139 A.L.R. 614.

(3) CHAMPERTY, a species
of MAINTENANCE whereby a stranger
makes a bargain with plaintiff
to divide the matter sued for
and the champertor is to carry
on the party's suit at his

own expense, Smith v. Hartsell,
150 N.C. 71, 63 S.E. 172, North
Carolina General Statutes §4-1.

III.

Where Respondent's attorney concurrently represented Petitioners in a substantially related state court action, did the Courts below deny Petitioners due process in: denying Petitioners' motion in the alternative for a stay of proceedings and sanctions?

* * *

It is submitted that all proceedings in the trial court should be STAYED pending resolution of the questions of conflict of interests and breach of confidential relationship. Such a Stay is not only proper but necessary, for the protection of these Petitioners' civil rights as guaranteed by the Fourteenth Amendment to the United States Constitution, Fullmer v. Harper, 517 F.2d 20 (10th

Cir. 1975) A substantial relationship exists between the pending suit and the matter in which Norman B. Smith also represented the Petitioners, as is demonstrated by his first set of Interrogatories for Sims purporting to seek information about Petitioners' Guilford County lands, cf. Uniweld Products, Inc. v. Union Carbide Corporation, 385 F.2d 992 (5th Cir. 1967), cert. denied, 390 U.S. 921, 88 S.Ct. 853, 19 L.Ed. 2d 980 (1968), Guy v. Avery County Bank, 206 N.C. 322, 173 S.E. 600 (1934), brought forward in the Code of Professional Responsibility of the North Carolina State Bar, Canons 4.1, 4.5 and 5.2. Respondents had reposed confidence in Attorney Smith as counsel for them in the Richardson case. The

proceedings should be Stayed by Order or Writ of Prohibition and if Respondent's claims are not dismissed on this Appeal, an Evidentiary Hearing before a jury as Prayed by Irvins should be had.

CONCLUSION

Respondent establishes that applicants who falsify apartment applications are not Petitioners' "kind of people." Attorney Smith through his representation of Petitioners knows and knew at all times prior to institution of this action against his own clients that Petitioners rent their properties to Blacks, Whites, Indians, Jamaicans, men and women. Attorney Smith knows and knew the extent of their property ownership and the answers to those questions posed by his first set of interrogatories as to their ownership of some of their properties with other members of the Irvin family; and his use of information acquired from Petitioners in confidence presumptively damaged them to the extent that they

incurred legal fees and used their time to prepare answers to those interrogatories at a time when Attorney Smith had possession, actual or constructive, of their files relating to their ownership of property and their renting of their lands and buildings to tenants without regard to race, color, religion or condition of previous servitude.

Respondent's remaining claims should be dismissed; Petitioners' Counterclaim should be reinstated and this action should be returned to the District Court below for evidentiary hearing on Petitioners' damages, Turner v. State of Maryland, 318 F.2d 852, 854 (4th Cir. 1963), cf. Cord v. Smith, 338 F.2d 516, 521 (9th Cir. 1964) mandate clarified

370 F.2d 418.

RESPECTFULLY SUBMITTED this 31st
day of *October*, 1977.

Armistead W. Sapp, Jr.
Armistead W. Sapp, Jr.
Counsel for Petitioners
219 West Washington Street
Greensboro, North Carolina 27401
(919) 275-7206

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CARLEEN V. SIMS

Plaintiff

v. Case No. C-76-93-G

CHARLES IRVIN, et al

Defendants

MEMORANDUM ORDER

Dated January 5, 1977

Filed January 11, 1977

This case was noticed for hearing in the United States Courtroom, Greensboro, North Carolina, on December 14, 1976, and was heard on the various Motions made by the parties. Ms. Judith G. Behar appeared as counsel for the plaintiff; Armistead W. Sapp, Jr.,

Esquire, appeared as counsel for the defendants.

This case arises out of the refusal of the defendants to rent an apartment to the black plaintiff. The plaintiff alleges that her rejection as lessee was on account of her race. The plaintiff contends that the defendants have violated the Civil Rights Act of 1966, 42 U.S.C. 1982, as well as the Fair Housing Act of 1968, 42 U.S.C. 3610 (d) and 3612. Jurisdiction of the Court is invoked under Title 28, U.S.C. 1331 and 1343. Furthermore, pursuant to Rule 25 of the Federal Rules of Civil Procedure, the plaintiff brings a class action on behalf of all other minority persons who have been similarly treated by the defendants.

There are various motions before the Court for determination. The defendants have filed a motion to dismiss, a motion for summary judgment and a motion to stay these proceedings. The plaintiff has filed a motion to dismiss the defendants' counterclaim, a motion for determination of the class and a motion to compel discovery.

DEFENDANTS' MOTION TO DISMISS

The defendants contend that the complaint fails to state a claim upon which relief can be granted. Furthermore, the defendants contend that the class action aspect of this suit fails to comply with Rules 23(a) (b) of the Federal Rules of Civil Procedure and Local Rule 17 (b) (2) (a)

(b), (3) and (4) in that there are inadequate facts to indicate that each requirement of the Rule has been met.

In support of the defendants' claim that the complaint fails to state a cause of action they point to the fact that the complaint, on its face, shows that the plaintiff's claim was not filed within the required period of time.

On May 23, 1975 the defendants notified the plaintiff that she would not be permitted to rent an apartment in their complex because "she was not their kind of people." This is the last act of discrimination alleged in the plaintiff's complaint. This suit was filed on February 19, 1976.

Therefore, it is clear from the face of the pleadings that the plaintiff's claim was not filed within 180 days from the date of the last alleged discriminatory act of the defendant. The Court expresses its thanks to the plaintiff for her candor in pointing out the cases of Young v. AAA Realty Co. of Greensboro, Inc., 350 F.Supp. 1382 (M.D.N.C. 1972) and Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973). Those cases hold that the plaintiff's Fair Housing Act Claim is time barred. Consequently, the plaintiff's claim under the Fair Housing Act cannot be maintained.

However, although the plaintiff has failed to state a cause of action under the Fair Housing Act of 1968, it is well settled that the facts

alleged in [her] complaint will support an action under 1982 of Title 42, U.S.C. Jones v. Mayer Co., 392 U.S. 409 (1968); Young, supra. Therefore, the defendants' motion to dismiss the plaintiff's 1982 claim is denied.

The defendants further contend that the class action portion of this action should be dismissed on the grounds that there was not an adequate statement of the basic facts to indicate that the requirements of Rule 23 had been met. The Court disagrees with the defendants' position in this matter. Young, supra, at 1387.

Furthermore, a deficiency in the factual allegations in the plaintiff's complaint will not support a dismissal

of the action. Therefore, the defendants' motion, in this regard, is denied.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The parties are in complete conflict as to the material facts in this case. This action is presently going through a period of discovery. When discovery is completed the parties may again raise their motions for summary judgment and they will be considered at that time. Therefore, the defendants' motion for summary judgment is denied.

PLAINTIFF'S MOTION TO DISMISS THE DEFENDANTS' COUNTERCLAIM

The defendants have filed a counterclaim in this action alleging that the plaintiff filed the present law

suit for the purpose of causing them embarrassment, humiliation and anxiety. Furthermore, the defendants allege that the plaintiff has interfered with the defendants' right to life, liberty, the enjoyment of the fruits of their own labor and the pursuit of happiness. The defendants allege that the Court has jurisdiction over this counterclaim pursuant to 42 U.S.C. 1983.

The plaintiff has moved to dismiss this counterclaim on the ground that it fails to state a claim. The plaintiff contends that if the counterclaim sets forth a cognizable claim at all, it is one for malicious prosecution. The defendants contend that the counterclaim sets forth a claim for abuse of process, barratry and champerty.

Initially, the Court has trouble determining that it has jurisdiction of the counterclaim under 42 U.S.C. 1983. Section 1983 is not a grant of jurisdiction, rather, it is statute creating a cause of action for violation of a constitutional right under color of state law. However, since the Court has jurisdiction over the plaintiff's claim it may hear and determine the merits of the defendants' counterclaim.

The Court has read the cases cited in the defendants' brief and finds that none of them deal with the issue before this Court. One case is a personal injury action and the remaining three deal with malicious prosecution.

The facts in the defendants' counterclaim will not support a claim for abuse of process. In Edwards v. Jenkins, 247 N.C. 565, 101 S.E.2d 410 (1958) the Court stated that,

There is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint . . . [m]ere adjectival denunciation will not be sufficient. Facts must be alleged upon which the court could determine that the gravamen of his action is of that character.

Edwards, supra, at 412.

Furthermore, abuse of process is the improper use of process after it has been issued, the use of process to accomplish some end not within the regular purview of the process. Wright v. Harris, 160 N.C. 542, 76 S.E.2d 489 (1912).

The only possible claim that the facts alleged in the defendants' counterclaim could support is a claim based upon malicious prosecution. It is clear that a claim for malicious prosecution cannot be maintained until the termination, in favor of the defendant, of the litigation which forms the basis of the claim. Manufacturers & Jobbers Finance Co. v. Lane, 221 N.C. 189, ___, 19 S.E.2d 849, 852 (1942).

Therefore, the plaintiff's motion to dismiss the defendants' counterclaim is allowed.

PLAINTIFF'S MOTION FOR A DETERMINATION
OF THE CLASS

The plaintiff has moved for a determination that this action be allowed to proceed as a class action pursuant to Rule 23 (c) (1) of the Federal Rules of Civil Procedure. The Court has concluded that this motion should be deferred for decision at a later time.

DEFENDANTS' MOTION TO STAY THE
PROCEEDINGS

On May 28, 1976, the defendants moved for a stay of this action

on the grounds that the plaintiff's counsel, Norman B. Smith, had previously represented the defendants in a State action. The defendants seek to have sanctions imposed upon the plaintiff's counsel and this action dismissed with prejudice.

Plaintiff's counsel, upon discovery of this conflict of interest, immediately petitioned the Court for his withdrawal as attorney for the plaintiff. On June 24, 1976, this Court authorized the withdrawal of Norman Smith as attorney for the plaintiff in this action.

Therefore, the defendants' motion for a stay of these proceedings is denied.

The defendants' motion to have sanctions imposed upon Norman Smith for this unintentional conflict of interest is also denied.

Discovery motions and objections to discovery will be considered by the magistrate.

ORDER

Therefore, IT IS ORDERED THAT:

- (1) the defendants' motion to dismiss is denied,
- (2) the defendants' motion for summary judgment is denied,
- (3) the plaintiff's motion to dismiss the defendants' counterclaim is allowed,
- (4) the plaintiff's motion for a determination of the class is deferred

for decision at a later time,
(5) the defendants' motion to stay the proceedings is denied, and
(6) the Motions relating to discovery are deferred for an initial determination by the Magistrate.

I, Graham Erlacher, Official Reporter of the United States District Court for the Middle District of North Carolina, do hereby certify that the foregoing is a true transcript from my notes of the entries made in the above-entitled Case No. C-76-93-G, before and by Judge Eugene A. Gordon, on December 14, 1976, in Greensboro, North Carolina, and I do hereby further certify that a copy of this transcript was mailed to each of the

below-named attorneys on January 5, 1977.

Given under my hand this 5th day
of January, 1977.

/s/ Graham Erlacher
Official Reporter

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1279
(Unpublished)

Carleen V. Sims,

Appellee,

v.

Charles Irvin and wife
Mary Elizabeth Irvin,

Appellant.

Appeal from the United States District
Court for the Middle District of North
Carolina, at Greensboro. Eugene A.
Gordon, District Judge.

OPINION

Submitted June 6, 1977

Decided July 11, 1977

Before BUTZNER, RUSSELL, Circuit Judges,

and FIELD, Senior Circuit Judge.

PER CURIAM:

The case is presently before the Court on Sims' motion to dismiss the Irvins' appeal and petition for writs of mandamus and prohibition.

Carleen Sims, a black woman, by her attorney Norman Smith filed suit against the Irvins (a husband and wife) alleging racial discrimination in the denial of an apartment rental. Class action status was sought. The Irvins denied these allegations, challenged the request for certification of a class, and counterclaimed for malicious prosecution.

While discovery was underway, the defendants discovered that Smith (plain-

tiff's counsel) was representing them in a state court proceeding involving trespass to another piece of property owned by them. They immediately moved for disqualification of counsel. Before the court ruled on this motion, attorney Smith requested permission to withdraw. This last motion was granted. The Irvins objected to the granting of Smith's motion and moved for the imposition of sanctions against him. This motion was denied at a hearing.

At the same hearing, the district court dismissed plaintiff's claims under 42 U.S.C. 3610, 3612 as untimely, see Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973), but held that the claim under § 1982 was sufficient. The court also denied defendants' motion for summary judgment, and deferred consider-

ation of the challenge to class action status. However, the court did grant plaintiffs' motion to dismiss the Irvins counterclaim.

This Court is without jurisdiction to hear an appeal on the issues other than those relating to disqualification since there is not yet any final judgment within the meaning of 28 U.S.C. § 1291, nor certification under either 28 U.S.C. § 1292 or F. R. Civ. P. 54(b). This is true even of the dismissal of the counterclaim for malicious prosecution, since all the issues between the parties are not yet resolved. Thompson v. United States, 250 F.2d 43 (4th Cir. 1957); Oak Construction Co. v. Huron Cement Company, 475 F.2d 1220 (6th Cir. 1973), cert. denied, 420 U.S. 982 (1975). The writs of prohi-

bition and mandamus are extraordinary writs, and are not substitutes for an appeal after the rendering of final judgment. Firestone Tire and Rubber Co. v. General Tire and Rubber Co., 431 F.2d 1199, cert. denied, 401 U.S. 975 (4th Cir. 1970). Accordingly, we decline to issue either of these writs in this case.

This Court has indicated that it might consider an interlocutory motion regarding the disqualification of counsel. United States v. Hankish, 462 F.2d 316 (4th Cir. 1972). And see generally Silver Chrysler Plymouth, Inc., v. Chrysler Motors Corp., 496 F.2d 800 (2nd Cir. 1974). That is not an issue here, however, for original counsel is no longer participating in the action. The Irvins conceivably

might be able to seek sanctions against Smith under F. R. Civ. P. 14 (although we express no view on this matter).

The propriety of sanctions or damages against Smith however, would not be collateral to the main action. In order to properly decide that issue, this Court would have to evaluate the evidence in the case in chief so as to determine whether the Irvins have been harmed by Smith's dual representation. It follows that the refusal of the district court to deny the Irvins' request for sanctions is not the proper subject of an interlocutory appeal because that claim is not independent of the main action. Cohen v. Beneficial Finance Corp., 337 U.S. 541 (1949); United States v. Hankish, supra. And since we perceive no clear abuse of

discretion in the district court's ruling, a writ of mandamus will not issue. United States v. Hankish, supra.

Accordingly, the appeal is dismissed. The petition for writs of mandamus and prohibition is denied.*

*Appellants request that in the event this Court acts unfavorably on the appeal, that we treat the papers as a petition for writ of certiorari. Petitions for writs of certiorari are to be filed with the Supreme Court, Supreme Court Rules § 21.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1279

Carleen V. Sims,

Appellee,

v.

Charles Irvin and wife
Mary Elizabeth Irvin,

Appellant.

ORDER

Filed August 4, 1977

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing be, and it is hereby, DENIED.

CONSTITUTIONAL PROVISIONS,
STATUTES, RULES AND
CANONS INVOLVED

United States Constitution
Amendment XIV.
U.S.C.A.Const. Amend. XIV. §1

§ 1. * * * No state shall make or
enforce any law which shall abridge
the privileges or immunities of cit-
izens of the United States; nor shall
any state deprive any person of life,
liberty, or property, without due pro-
cess of law; nor deny to any person
within its jurisdiction the equal pro-
tection of the laws. * * *

United States Code

Title 28

§ 1254 (1). Courts of appeals;
certiorari; appeal; certified questions.

Cases in the courts of appeals may be
reviewed by the Supreme Court by the

D-1

Entered at the direction of Judge
Butzner for a panel consisting of
Judge Butzner, Judge Russell, and
Judge Field.

For the Court,

/s/ William K. Slate, II
CLERK

following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

United States Code

Title 28

§ 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code

Title 28

§ 1292. Interlocutory decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

* * *

* * * (4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

United States Code

Title 28

§ 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States * * *

United States Code

Title 28

§ 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdic-

tion of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

United States Code

Title 28

§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

D-7

United States Code

Title 42

§ 1982. Property rights of citizens.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

North Carolina General Statutes

Volume 1B

Chapter 4. Common Law

§ 4-1. Common law declared to be in force.

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State

and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

North Carolina General Statutes,

Volume 4A, 1975 Cum. Supp.;

Appendix VII--Code of Professional

Responsibility of the North

Carolina State Bar

CANON 4

p. 233

A Lawyer Should Preserve the
Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC4-1 Both the fiduciary relationship

existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client

not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

p. 234

EC4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment

should be accepted that might require such disclosure.

CANON 5

p. 235

A Lawyer Should Exercise Independent
Professional Judgment on Behalf
of a Client

ETHICAL CONSIDERATIONS

Interests of a Lawyer That May Affect
His Judgment

EC5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain

from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

DISCIPLINARY RULES

p. 240

Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

DR5-105

(B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the

extent permitted under DR5-105 (C).

- (D) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment.

Federal Rules of Civil Procedure

Rule 11

SIGNING OF PLEADINGS

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided

by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary

action. Similar action may be taken if scandalous or indecent matter is inserted.

Federal Rules of Civil Procedure

Rule 12 (b) (6)

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted, * * *. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being

joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rules of Civil Procedure

Rule 23 (a) (b) (c) (1)

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in

addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has

acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or

against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

Federal Rules of Civil Procedure

Rule 54 (b)

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form

of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Federal Rules of Civil Procedure
Rule 56 (b)

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

MANUAL FOR COMPLEX LITIGATION

§1.40 Necessity for Early Determination of Class Action Questions.

One or more of the parties may

request in the original or amended pleadings that a civil action proceed as a class action under Rule 23, F.R. Civ.P., or the court may initiate, by use of an order to show cause, an inquiry into whether an action should be converted into a class action. In this manner, a simple civil action may become quite complex and a complex action may become more complex.

Rule 23(c)(1) provides that the court shall determine "as soon as practicable after the commencement of an action brought as a class action" whether or not it should proceed as a class action. Therefore, at the preliminary pretrial conference the court should explore whether the action is brought as or may develop into a class action; if so, necessary preliminary steps should be taken to make possible

the prompt determination whether it should be so maintained.

The mandatory language of Rule 23(c)(1) is based upon sound and urgent practical considerations. If the determination whether the action should proceed as a class action is delayed, serious injustices may result, and avoidable procedural difficulties of great magnitude may ensue. For example, persons having notice of the class action request, thinking themselves represented in the proposed class action, may, in reliance on the requested class action, fail to make a claim for relief until the statute of limitations has run. If the class action request is belatedly denied, these persons may have lost their right to sue to protect their individual interests. If discovery proceeds in the action while

a class action request remains undetermined, and the court later determines that the action may be so maintained, the discovery may be unusable because of the absence of parties and absence of representation of the members of the class.

For these and many other reasons, a court should never delay the scheduling of a prompt and expeditious hearing, at which evidence with respect to the class action question may be received. Some or all of the material facts may be established by pleadings or stipulation of parties. Recent experiences demonstrate that in no event should there be a tentative determination of a class action request for the purposes of settlement.

A separate schedule for discovery on the class action issue should be estab-

lished if it appears that discovery will be required to provide a basis for the determination of the class action issue. Ordinarily it will not be necessary or desirable for such discovery to be conducted at the same time discovery is scheduled on the merits of the case.

If class action proceedings are initiated by the court sua sponte, the court should make tentative written determination including the requisite findings of fact under subdivisions (a) and (b) of Rule 23 and should, in an evidentiary hearing, afford the opposing party or parties an opportunity to refute such findings.

§1.41 Preventing Potential Abuse of Class Action.

The class action under Rule 23 is subject to abuse, intentional and inad-

vertent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and

create impressions which may reflect adversely on the court or the administration of justice. To anticipate and prevent these abuses timely action should be taken by local rule or by orders in the particular civil action or by both. * * *

Local Rules

Middle District of North Carolina

Rule 17 (b) (2) (a) (b) (3)

and (4)

(b) Class Actions. In any case sought to be maintained as a class action:

(1) The complaint shall bear next to its caption the legend, "Complaint--
Class Action."

(2) The complaint shall contain under

a separate heading, styled "Class Action Allegations":

(a) A reference to the portion or portions of Rule 23, F.R.Civ.P., under which it is claimed that the suit is properly maintainable as a class action.

(b) Appropriate allegations thought to justify such claim, including, but not necessarily limited to:

1. the size (or approximate size) and definition of the alleged class,

2. the basis upon which the plaintiff (or plaintiffs) claims

(i) to be an adequate representative of the class, or

(ii) if the class is comprised of defendants, that those

named as parties are adequate representatives of the class.

3. the alleged questions of law or fact claimed to be common to the class, and

4. in actions claimed to be maintainable as class actions under subdivision (b)(3) of Rule 23, F.R.Civ.P., allegations thought to support the findings required by that subdivision.

(3) Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, F.R.Civ. P., as to whether the case is to be

maintained as a class action. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the court for renewal of the motion before the same judge.

(4) The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross claim alleged to be brought for or against a class.

§ 5 -----Overt Act

An "overt act," as the term is used in civil conspiracy proceedings, is something apart from a conspiracy, and is an act which must accompany or follow the agreement and must be done in furtherance of, and designed to carry out, the purpose or object of a conspiracy. Generally such act is either illegal or tainted with elements of deceit, trickery, or chicanery.

As discussed infra § 43, it is not essential to criminal liability for conspiracy that any overt act should have been committed in furtherance thereof, unless otherwise provided by statute. To create civil liability, however,

there must have been an act done by
one or more of the conspirators pur-
suant to the scheme and in furtherance
of the object.